

Effective Grievance Mechanisms in European Due Diligence Legislation

Recommendations for the Design of the Corporate Sustainability Due Diligence Directive (CSDDD)

1 Background

Fatal accidents, environmental disasters and serious human rights violations are a recurring problem in the global value chains of many companies. It is essential that impacted individuals have access to opportunities for remedy, not only to ensure their right to redress, but also to minimise the risk of adverse impacts to human rights or the environment. According to the UN Guiding Principles on Business and Human Rights (UNGP), governments have a duty to protect human rights (Pillar 1); companies have a responsibility to respect these rights (Pillar 2); and opportunities for judicial and non-judicial remedy of human rights violations are necessary (Pillar 3). Within the third pillar of the UNGP, different types of remedy are described.

This paper focuses on non-state-based operational-level grievance mechanisms.¹ Such mechanisms are furnished by companies or by independent third parties. They act as a complement to other grievance mechanisms, such as official procedures (state non-judicial grievance mechanisms) and lawsuits, e.g. under civil law (state judicial mechanisms). In this way, non-state-based operational-level grievance mechanisms help to ensure that rights holders have access to a multi-layered system of remedy. Operational-level grievance mechanisms can fulfil important functions in relation to risk identification and prevention, and help to build confidence between rights holders and companies. As rights holders can easily avail themselves of such mechanisms at an early stage, they can achieve a very strong impact with relatively little effort. However, this necessitates a well-designed grievance mechanism, as well as its rigorous and competent application.

As a supplement to corporate grievance mechanisms, collective grievance mechanisms – for example, within the scope of a multi-stakeholder initiative or industry association – can offer further benefits for companies and rights holders. Collaboration with other companies and relevant stakeholders – such as civil society and trade union representatives, as well as rights holders or their agents – can help to increase influence, pool resources and harmonise procedures and standards. The quality and effectiveness of procedures can be improved through mutual exchange and collective learning. In particular, collective grievance mechanisms run by independent third parties or in a parity governance structure together with other stakeholder groups – for example, civil society actors and trade unions – can ensure independence

¹ Definition of terms based on United Nations (2011): [UN Guiding Principles on Business and Human Rights](#): According to UNGP 28, non-state-based grievance mechanisms include those administered by a business enterprise alone or together with stakeholders, an industry association or a multi-stakeholder group. Within the broader category of non-state-based grievance mechanisms, this paper distinguishes between company-internal grievance mechanisms and collective grievance mechanisms. Both are included under the umbrella term of operational-level grievance mechanisms, according to UNGP 29. Furthermore, within the category of collective grievance mechanisms, it is important to distinguish between (1) multi-stakeholder-driven collective grievance mechanisms and (2) collective grievance mechanisms driven by other actors, e.g. by industry.

more credibly than corporate grievance mechanisms.^{2,3} Last but not least, a collective approach increases the likelihood of achieving an impact in locations with structural problems, such as conflict regions or those with high corruption risks and weak statehood.

Against this backdrop, this paper examines the role played by operational complaint mechanisms within the Corporate Sustainability Due Diligence Directive (CSDDD), which is currently being negotiated in a trilogue between the EU Commission, Parliament and Council. Based on this assessment, the paper provides recommendations on how to harness the current legislative momentum to create the necessary conditions for the establishment of effective operational-level and in particular collective grievance mechanisms across the EU.

2 An evaluation of EU-level proposals

Summary

The EU Commission's proposal does not yet adequately fulfil key functions foreseen by the UN Guiding Principles for operational-level grievance mechanisms. Specifically, the proposal evinces deficits with regard to the mechanism's functions as (1) an early-warning indicator for identification and analysis of adverse impacts, and (2) a tool for remedy and redress. Moreover, there are excessive gaps in the proposal's implementation of the UNGP effectiveness criteria. Both the EU Council and Parliament have affirmed that grievance mechanisms must be guided by the effectiveness criteria set forth under UNGP 31. This should be expressly stipulated in the legislative text, as recommended by the EU Parliament. Furthermore, the legislation should be formulated to ensure that grievance mechanisms can fulfil their key functions with a view to serving as an early-warning indicator and analytical tool, while also contributing to effective remedy and redress. Among the three proposals, the EU Parliament position comes closest to fulfilling these goals. Accordingly, the Parliament proposal should serve as the basis for the EU trilogue negotiations. However, the EU Parliament proposal needs to be improved in some respects.

On 23 February 2022 the European Commission presented its proposal for a Corporate Sustainability Due Diligence Directive (CSDDD).⁴ The EU Council adopted its General Approach and current negotiating stance at the end of 2022,⁵ and on 1 June 2023 the EU Parliament has adopted amendments.⁶ In all proposals, the due diligence obligations include an operational-level grievance mechanism,⁷ and failure to establish this mechanism may result in administrative sanctions. While the Commission's proposal for the grievance mechanism has significant deficits with a view to human rights, the Council's position represents an improvement in some respects. The Parliament's proposals go further than that of the Commission and Council, and thus represent the best implementation overall of the UNGP requirements for operational-level grievance mechanisms. However, the Parliament's draft also contains some problematic provisions; with regard to these specific points, the Council's position appears preferable.

The following discussion focuses on the Parliament's proposed amendments, as these are currently the most far-reaching in relation to grievance mechanisms. These proposals serve as a touchstone for our

² UN High Commissioner for Human Rights (2020). In the following: UNHCHR ARP.III (2020), Policy Objectives 15 and 16.

³ Gläßer et. al (2021), p. 110ff.

⁴ Commission Proposal (2022).

⁵ Permanent Representatives Committee of the EU Council (2022). Hereinafter, Council (EU) (2022).

⁶ EU Parliament (2023).

⁷ Article 4(1d), Article 9 of Commission Proposal (2022), Council (EU) (2022), EU Parliament (2023).

comparative assessment with the proposals of the EU Commission and the Council. Based on this assessment, we provide concrete recommendations as to how the Parliament's proposal should be improved during the trilogue negotiations.

The **EU Parliament's proposal for the CSDDD takes into account the two key functions of operational-level grievance mechanisms foreseen by the UNGP**.⁸ Specifically, the Parliament proposal asserts that "legitimate concerns" about potential or actual adverse impacts to human rights or the environment should suffice to justify a complaint (all three proposals are unified in this regard). In this way, grievance mechanisms can be harnessed preventively as an *early warning system for the identification and analysis of adverse impacts*. The fulfilment of this first key function is further strengthened in the Parliament proposal by provisions that foresee submission of 'notifications' of potential or actual adverse impacts.

The EU Parliament proposal introduces a distinction between 'notifications' and 'grievances'⁹, thus underscoring that the mechanism has an informational function, in addition to a remedial one.¹⁰ An additional aspect of the Parliament proposal that should be lauded is the following: it provides (in a point of contrast to the proposals of the Commission and Council) for complaints to be filed and remedy to be requested in cases of adverse environmental impact in which no individual has suffered damages; furthermore, environmental organisations are among the actors empowered to lodge such complaints.¹¹ However, the distinction between notification and grievance is problematic in this context, for it means that other civil society organisations as well as land and environmental defenders can only prepare a notification and not – as is the case in the Commission and Council proposals, at least with regard to civil society organisations – submit a complaint.¹² This has the effect of limiting their consultative and informational rights, as they are not directly involved in the complaint proceedings.¹³ At the same time, the Parliament proposal strengthens the provisions regarding evaluation and, in Article 10, extends the monitoring obligations of companies in this regard beyond risk analysis, prevention and remediation to all due diligence measures, including the grievance mechanism. Under Article 9(1), the proposal of the EU Parliament – as well as that of the Council – provides for the use of collective initiatives within the framework of notification and complaint proceedings. Both of the foregoing provisions make an important contribution to the early identification, analysis and prevention of adverse impacts to human rights.

The second key function under UNGP 29 pertains to *remedy and redress*. The Parliament draft provides for both remedy and redress by virtue of the broad interpretation of redress foreseen under Article 8(3) – namely, that affected persons and/or the environment should be restored to a 'situation equivalent or as close as possible to their situation prior to the impact'. In contrast to the Commission proposal, the Parliament proposal thus provides for more than just financial compensation. Material requirements in this regard are more closely specified under a separate article (Article 8c), which aims to ease the enforcement of remedy and redress. An additional aspect of the Parliament proposal that deserves commendation is the explicit provision clarifying that use of non-judicial grievance procedures is not a prerequisite for voicing legitimate concerns in accordance with Article 19, nor for access to judicial or non-judicial proceedings.¹⁴ In addition, the EU Parliament's draft would require companies to meaningfully engage affected stakeholders in the due diligence process (including the grievance mechanism) as well as to adopt measures to protect affected stakeholders from retaliation, including in particular vulnerable groups.¹⁵

⁸ According to UNGP 29, operational-level grievance mechanisms perform two key functions with regard to the responsibility of business enterprises to respect human rights: specifically, they (1) enable identification, analysis and prevention of adverse human rights impacts, and (2) ensure early remedy and redress of adverse impacts.

⁹ The proposals of the EU Commission and the Council use the term "complaint", whereas the Parliament introduces the term "grievance". In the following, we will use the term "complaint" respectively, also where it refers to the Parliament proposals.

¹⁰ Article 9(1) of [EU Parliament \(2023\)](#).

¹¹ Article 9(2a) of [EU Parliament \(2023\)](#).

¹² Article 9(2a) of [EU Parliament \(2023\)](#).

¹³ Article 9(4) of [EU Parliament \(2023\)](#).

¹⁴ Art. 9(4b) of [EU Parliament \(2023\)](#).

¹⁵ Article 8d(5) and (7), Art. 9(3a)(3b)(3c) and (4) of [EU Parliament \(2023\)](#).

However, the Parliament draft should be criticised for its failure to extend the aforementioned engagement to individuals who anonymously submit notifications or complaints. Furthermore, the rights of individuals who submit notifications are curtailed in comparison to those who submit complaints. In addition, the provisions in this regard should be amended to clarify that individuals who submit notifications and complaints are entitled to entrust third parties – including civil society organisations – with the assertion of their rights. In this connection, the concept of ‘legitimate representatives’ invoked under Article 9(2a) is too vague.

In a point of contrast to the Parliament proposal, the grievance mechanisms set forth by the Commission and Council fail in numerous respects to fulfil the key functions foreseen by the UNGP.

Both proposals lack obligations pertaining to documentation and assessment,¹⁶ and the scope of individuals entitled to lodge a complaint is too narrowly defined.

The Commission proposal provides for cooperation with other companies as part of prevention and remedy, but not within the context of grievance proceedings. By contrast, the Council and Parliament propose putting collective grievance mechanisms on equal footing with internal company procedures.

With regard to remedy and redress, the Commission’s proposal is too focused on ending adverse impacts, and only mentions financial compensation for impacted persons.¹⁷ Like the Parliament proposal, the Council position goes further in this regard, obliging companies to ensure actual redress for those affected.

Moreover, the requirement for companies to involve stakeholders in the due diligence process, as proposed by the Parliament, has no equivalent in the proposals tendered by the Council and Commission. Rather, the Council and Commission only foresee consultation in certain circumstances for risk analysis, prevention and remediation. Protection against retaliation is also not sufficiently ensured in the proposals of the Council and Commission. One particular shortcoming in the Commission proposal is the mere reference to the applicability of the EU Whistleblower Directive (2019/1937) under Article 23.¹⁸ This aspect of the proposal is inadequate because it only applies to whistleblowers who have acquired information concerning a grievance in a professional context, but not other persons, such as local residents. Moreover, Directive (EU) 2019/1937 only governs breaches of the law, and is thus too narrowly conceived for the present context, as an individual who reports problems to a local supplier is already exposed to the risk of retaliation, even if these grievances do not yet constitute a legal violation on the part of the company procuring the supplied product under European law. The risk of retaliation is also present when such notifications serve as an early-warning indicator for the company. The Council proposes enshrining the right to anonymity and protection against retaliation by companies under Article 9(3), but fails to recognise the possibility of retaliation by third parties.

When all three proposals are compared, the Parliament proposal best implements the effectiveness criteria set forth under UNGP 31.¹⁹

Under Article 9(3a), the Parliament proposal incorporates most of the effectiveness criteria mentioned under UNGP 31, and establishes further requirements for the independence of the mechanism,²⁰ for stakeholder engagement,²¹ for the protection of vulnerable groups,²² and for protecting individuals submitting notifications or complaints.²³ The Parliament’s expansion of the provisions of Article 10 regarding the monitoring of grievance mechanisms furnishes a basis for continuous

¹⁶ See Article 10 and 11 of [Commission Proposal \(2022\)](#).

¹⁷ See Article 8, particularly para. 3 of [Commission Proposal \(2022\)](#).

¹⁸ This Directive provides for the protection of anonymity ([Article 16](#)) and prohibits retaliation in the context of the employment relationship ([Article 19](#)).

¹⁹ State and non-state non-judicial grievance mechanisms are subject to the effectiveness criteria set forth under UNGP 31.

²⁰ Article 9(3a) of [EU Parliament \(2023\)](#).

²¹ Article 8d(1), Article 9(3a–3c) and (4–4b) of [EU Parliament \(2023\)](#).

²² Article 8d(7) of [EU Parliament \(2023\)](#).

²³ Article 9(3b) of [EU Parliament \(2023\)](#).

learning, as foreseen under UNGP 31(g). However, in part to meet the transparency requirements set forth under UNGP 31(e), the reporting obligations under Article 11 should be strengthened. Specifically, for these transparency requirements to be fulfilled there must be accurate documentation of grievance procedures – and, in addition, public reporting of their use, to enable evaluation in collaboration with stakeholders.²⁴

The Commission proposal, for its part, does not contain any direct reference to the UNGP effectiveness criteria; the Council proposal, by contrast, only mentions some of them under Article 9(3). The Commission proposal is particularly insufficient in its implementation of the effectiveness criteria set forth under UNGP 31; parts of the Council proposal are also deficient in this regard. The Commission proposal for the CSDDD does not contain any provisions to assure the legitimacy of the mechanism (UNGP 31a) by means of independence, trust-building or accountability. While the grievance mechanism should be open to potentially and actually affected parties – such as employees, trade unions, and civil society organisations dedicated to the issue in question – under the Commission proposal, there is no requirement to disclose the existence of the mechanism to third parties, such as indigenous peoples or farming communities. According to UNGP 31b, however, proactive efforts must be made to ensure the mechanism is known to all relevant stakeholder groups. The Commission proposal also lacks requirements to ensure access to vulnerable groups.²⁵ Reliance on the Whistleblower Directive (EU) 2019/1937 to protect individuals who submit a grievance is also insufficient. UNGP 31c calls for clear and known rules of procedure to be adopted. However, the Commission and Council proposals devote minimal attention to the procedural involvement of individuals who submit a complaint – in particular for clarifying facts, shaping the proceedings, and determining measures for remedy and redress. UNGP 31d addresses the need for equity in the grievance procedure; the proposals do not speak of a burden of proof being imposed on complainants, but rather only of the need for ‘legitimate concerns’.²⁶ The associated requirements imposed on individuals who submit a grievance, but also the corresponding duty to cooperate borne by companies, should be made explicit for the purpose of clarity. The Commission and Council proposals also lack specific requirements to ensure that outcomes and remedies are compatible with internationally recognised human rights (UNGP 31f). While both the Commission and Council proposals call for monitoring for the purpose of risk analysis, prevention and remedy, this monitoring does not apply specifically to the grievance mechanism. Accordingly, these proposals do not meet the transparency requirements contained in UNGP 31e, nor do they assure learning in line with UNGP 31g. They also fail to call for stakeholder engagement and dialogue (as per UNGP 31h), which reduces the potential for effective redress.

²⁴ See [UNHCHR ARP III \(2020\)](#), Policy Objective 13, as well as UNHCHR ARP III – Addendum 1, para. 68–71.

²⁵ Vulnerable groups include, for example, migrant workers, women, children and indigenous communities. This is a non-exhaustive list. Various factors can contribute to vulnerability; see [INKOTA \(2022\)](#), p. 6.

²⁶ See Article 9(1) of [Commission Proposal \(2022\)](#), [Council \(EU\) \(2022\)](#) and [EU Parliament \(2023\)](#).

3 Recommendations for CSDDD design with a view to operational-level grievance mechanisms

Operational-level grievance mechanisms can play an important complementary role within a broader system of redress. Their particular value lies in their fulfilment of two key functions: (1) early identification and analysis of adverse impacts, which is crucial for prevention, and (2) remedy and redress. **Operational-level grievance mechanisms should be designed in line with the UNGP, which represents the international standard in this regard.** This is crucial for the fulfilment of the aforementioned key functions. Adherence to UNGP recommendations is all the more important when it comes to independent collective grievance mechanisms. To ensure such mechanisms can realise their potential, the CSDDD should be specifically designed to strengthen their complementary function.

Elements of the Parliament proposal that should be retained

- The EU Parliament recommends explicitly enshrining the effectiveness criteria set forth under UNGP 31 in the CSDDD.²⁷ Accordingly, all of the UNGP effectiveness criteria are included in the Parliament's draft Directive. Furthermore, the Parliament recommends various substantive provisions to ensure appropriate implementation.^{28,29} The negotiations should follow the approach taken by the Parliament by harnessing Guiding Principles 29, 30 and 31 as a foundation for the design of operational-level grievance mechanisms. To this end, legislators should make explicit and binding the UNGP effectiveness criteria as well as two key functions of (1) early identification and analysis, and (2) remedy and redress. These standards should also be explicitly extended to collective grievance mechanisms.
- By virtue of the distinction drawn between notifications and complaints, the Parliament CSDDD proposal makes it clear that the mechanism intends to fulfil an informational function and to encourage further actions to identify potential adverse impacts. This distinction thus serves to strengthen the complementary role of identifying adverse human rights impacts.
- The extension of monitoring obligations to encompass the grievance mechanism itself, as proposed by the EU Parliament, is crucial for its effectiveness as an early warning indicator, and should therefore be given greater consideration in the trilogue negotiations. This will strengthen the complementary role of analysis.
- The Parliament proposal extends the meaningful engagement of stakeholders in relation to all aspects of the corporate due diligence process, including the grievance mechanism. It also foresees measures to protect potential or actual impacted persons from retaliation, while giving special attention to vulnerable groups; the proposed measures go beyond mere reference to the Whistleblower Directive, which is only applicable to a limited extent. This recommendation serves to strengthen the complementary role of prevention.
- The broad conception of redress contained in the Parliament proposal is to be applauded. It serves to strengthen the complementary function of remedy and redress. Impacted persons should have a voice in selecting the method of remedy. When remedy is designed in an equitable manner, solutions will tend to be more robust.³⁰ Therefore, dialogue between relevant actors should be encouraged, and trained personnel should be available to support this process. The

²⁷ Council (EU) (2022), Recital 42; EU Parliament (2023).

²⁸ Article 9(3a) of EU Parliament (2023).

²⁹ Article 8d(1) and (7), Article 9 (3a–3c) and (4–4b) of EU Parliament (2023).

³⁰ Gläßer et. al (2021), p. 418.

Parliament proposal is very promising in this regard, as it foresees comprehensive engagement with stakeholders, including in relation to grievance mechanism design.

- According to the Parliament proposal, each member state should clarify what grievance mechanisms are already in place (including domestic regulatory channels). Subsequently, member states should determine what these mechanisms do, and whether they meet international standards, including in particular UNGP 25–31.³¹ While the existence of various channels for pursuing grievances could confuse impacted persons or their supporters, this should be harnessed as an advantage. It is thus the responsibility of the member state, as part of its duty to ensure effective remedy, to provide guidance to actually or potentially impacted persons regarding their various options for pursuing a complaint.
- Both the Parliament and Council proposals allow companies to participate in collective grievance mechanisms. In order to fully exploit the increased effectiveness potential of collective grievance mechanisms, member states should be required to adopt an enabling normative framework.³² However, this must not include a liability privilege for companies that participate in industry initiatives featuring grievance mechanisms. When passing corresponding legislation, EU member states should clarify that collective grievance mechanisms must additionally meet international standards in terms of key functions and effectiveness criteria. Legitimacy can be established by adopting a parity governance structure in which marginalised rights holders are adequately represented,³³ and by involving rights holders in the design of such mechanisms.³⁴
- The Parliament proposal explicitly emphasises that the use of an extra-judicial grievance mechanism is not a prerequisite – neither for the expression of legitimate concerns pursuant to Article 19, nor for access to judicial proceedings.

Recommended additions to the EU Parliament proposal

- Other civil society organisations dedicated to issues of relevance for the impacted value chain should not only be allowed to submit notifications of adverse impact, but should also be authorised to file complaints and participate in proceedings, as is foreseen in the Commission and Council proposals. Land and environmental defenders and their representative organisations should be treated not only as notifying parties, but instead – as in the Council proposal (Recital 26a; Article 3n) – as entities with procedural rights entitled to file complaints. By this means they will gain the consultative and information rights that are crucial for their work.
- The concept of ‘legitimate representatives’ set forth under Article 9 (2a) remains too vague. It should be made clear that persons submitting notifications or complaints may entrust third parties, including civil society organisations, with the assertion of their rights.
- Procedural rights should also apply to all persons who submit notifications or complaints anonymously. The fact that safety considerations may force parties to appear anonymously does not justify limiting their procedural rights, as such rights are essential for ensuring a fair process and access to effective remedy.
- To ensure more comprehensive provisions for protecting whistleblowers, Article 8d should require consultation of persons in need of protection with a view to protection needs and measures.
- The first key function of the UNGP (i.e. to serve as an early warning indicator that aids identification and analysis) should be strengthened by imposing an explicit obligation on companies to identify potential adverse impacts. In this connection, one important action is for companies to

³¹ UNGP, No. 25 Commentary.

³² Article 9(1), Article 14(4) [EU Parliament \(2023\)](#).

³³ [Gläser et. al \(2021, p. 112ff.\)](#).

³⁴ [UNHCHR ARP III \(2020\)](#), Policy Objective 7(7); UNHCHR ARP III – Addendum 1, margin no. 34.

proactively monitor their value chains and to make grievance mechanisms known and accessible within these value chains.

- To meet the transparency requirements elaborated under UNGP 31e, the reporting obligations set forth under Article 11 should be strengthened. To this end, grievance procedures must be accurately documented and publicly reported so that they can be evaluated in collaboration with stakeholders.
- Furthermore, all due diligence obligations need to be interlinked, in order to ensure that risk analysis as well as prevention and remediation measures take the outcomes of grievance proceedings into account.

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